

09-06-07
EWA
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s): Pinzon et al.

Serial No.: 10/722,878

Filed: November 26, 2003

For: TOPICAL AQUEOUS CLEANSING COMPOSITION

Examiner: N. Ogden, Jr.

Art Unit: 1751

Confirmation No.: 1663

Customer No.: 27,623

Attorney Docket: 682.0043USU

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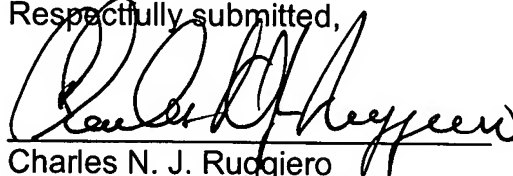
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2. Appellant's Third Supplemental Appeal Brief (*in triplicate*);
3. Transmittal letter in duplicate; and
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Please charge any additional fees or credit any such fees, if necessary to Deposit Account No. **01-0467** in the name of Ohlandt, Greeley, Ruggiero & Perle. A duplicate copy of this sheet is attached.

September 5, 2007

Date

Respectfully submitted,



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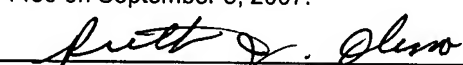
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REPLY TO THE NOTIFICATION OF NON-COMPLIANT APPEAL BRIEF

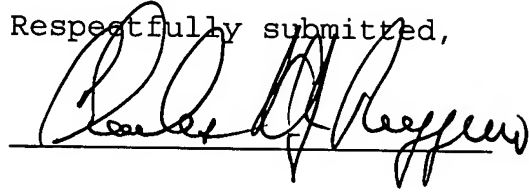
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Dear Sir:

The enclosed Third Supplementary Appeal Brief is being submitted in response to the NOTIFICATION OF NON-COMPLIANT APPEAL BRIEF mailed August 6, 2007. The Third Supplementary Appeal Brief addresses the comment that the column and line number of dependent claims 23, 26, and 27 are not provided.

Allowance of claims 1 to 29 is deemed warranted and allowance of said claims is earnestly solicited.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles N. J. Ruggiero", is written over a horizontal line.

Dated: September 5, 2007

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THIRD SUPPLEMENTAL APPEAL BRIEF UNDER 37 C.F.R. 41.37

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REAL PARTY IN INTEREST

The real party in interest is Avon Products, Inc., the assignee of record.

RELATED APPEALS AND INTERFERENCES

There are none.

STATUS OF THE CLAIMS

Claims 1 to 29 have been rejected. Claims 1 to 29 are being appealed.

STATUS OF AMENDMENTS

There were no amendments filed subsequent to final rejection.

SUMMARY OF THE CLAIMED SUBJECT MATTER

Claim 1 is directed to a topical (page 10, lines 17 to 28) aqueous (page 4, lines 27 to 31) cleansing composition (page 2, lines 15 and 16 and page 3, lines 8 to 11). The composition has about 0.05 wt% to about 20 wt% (page 2, line 24 and page 3, lines 20 to 22) of one or more waxes (page 2, line 24 and page 4, lines 5 to 18) having a melting point of about 70° C or more (page 2, line 25 and page 3, lines 28 and 29). The composition also has an anionic surfactant (page 2, line 25 and page 5, line 26 to page 6, line 7) and an additional surfactant (page 2, lines 25 to 29) selected from the group consisting of a nonionic surfactant (page 6, lines 9 to 21), an amphoteric surfactant (page 6, line 23 to page 7, line 3, and a combination of a nonionic surfactant and an amphoteric surfactant (page 2, lines 28 and 29). The anionic surfactant and the additional surfactant are present in an amount effective to stabilize the wax in the composition (page 2, lines 29 and 30 and page 5, lines 9 and 10). The composition further has about 20 wt% or more water (page 4, lines 27 to 31).

Claims 19, 22, and 25 are each directed to a composition in the form of a dispersion (page 7, line 30 to page 8, line 6).

Claim 28 is directed to a method for cleansing a keratinous surface (page 3, lines 1 to 4 and 10, lines 17 to 28).

Claim 29 is directed to a method for moisturizing a keratinous surface (Field of Invention, line 4; page 3, line 18; and claim 29 as originally filed).

Claims 2 to 10, 21, and 24 are directed to compositions having narrower wax melting point ranges (page 3, lines 28 to 31), iodine point ranges (page 4, lines 16 to 18), amounts (page 4, lines 20 to 25), hardness (page 4, lines 1 to 3), and species (page 4, lines 5 to 15). Claims 11, 12, 21, and 25 are directed to compositions having narrower surfactant amount ranges (page 5, lines 11 to 24). Claims 13 to 15, 21, and 24 are directed to compositions having narrower water amount ranges (page 4, lines 27 to 31). Claims 16 to 18, 21, and 24 are directed to compositions having narrower viscosity ranges (page 7, lines 14 to 18). Claims 20, 23, and 26 are directed to compositions in the form of an emulsion (Page 7, line 31). Claim 27 is directed to a composition that is substantially free of thickeners or viscosifiers other than the high melting point wax (see claim 27 as originally filed).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

1. In the rejection of claims 1 to 29 under 35 U.S.C. 103(a) in view of U.S. Published Application No. 2002/0010114 to Dufay et al., has a case of prima facie obviousness been established?
2. Further to the rejection of claims 1 to 29 under 35 U.S.C. 103(a) in view of U.S. Published Application No. 2002/0010114 to Dufay et al., are such claims nonobvious over the disclosure of Dufay et al.?

ARGUMENT

1. In the rejection of claims 1 to 29 under 35 U.S.C. 103(a) in view of U.S. Published Application No. 2002/0010114 to Dufay et al., has a case of prima facie obviousness been established?

(i) Independent claim 1 and dependent claims 28 and 29

According to MPEP 2144.08(II)(A), the requirements for establishing a case for prima facie obviousness are the following:

1. determine the scope and content of the prior art;
2. ascertain the differences between the closest disclosed prior art species or subgenus of record and the claimed species or subgenus;
3. determine the level of skill in the art; and

4. determine whether one of ordinary skill in the art would have been motivated to select the claimed species or subgenus.

A case for prima facie obviousness has not been established for claims 1, 28, and 29 in view of Dufay. Applicants assert that one of ordinary skill in the art would not have been motivated to select the claimed invention in view of the disclosure of Dufay.

Dufay discloses aqueous cleansing concentrate having about 20 to about 40 wt% of a fatty acid alkyl ester and about 5 to about 20 wt% of an emulsifier, in particular, nonionic surfactants [0012]. The concentrate is in the form of a PIT emulsion with droplets having a mean diameter of below about 50 micrometers [0004]. Emulsifiers include the nonionic surfactants, zwitterionic surfactants, ampholytic [amphoteric] surfactants, and cationic surfactants set forth in [0013] to [0033]. Optional ingredients include refatting agents, polyols, surfactants, oil components, fats, waxes, pearlizing waxes, superfatting agents, stabilizers, polymeric surfactants, silicone compounds, UV protection factors, antioxidants, light-blocking pigments, biogenic agents, deodorants, germ inhibitors, enzyme inhibitors, odor absorbers, antiperspirants, oil-soluble auxiliaries, film formers, antidandruff agents, swelling agents, insect repellents, self-tanning agents, depigmenting agents, hydrotropes, preservatives, perfume oils, and dyes. The preparations may include anionic, nonionic, cationic, and/or amphoteric, or zwitterionic surfactants at from normally about 1 to about 70 wt% [0060, first sentence].

One of ordinary skill in the art would not have been motivated to select the claimed invention in view of the disclosure of Dufay for several reasons.

First, claims 1, 28, and 29 require at least two different ingredients that are merely optional in the compositions of Dufay. Independent claim 1 requires a) about 0.05 wt% to about 20 wt% of one or more waxes having a melting point of about 70° C or more and b) an anionic surfactant and an additional surfactant selected from the group consisting of a nonionic surfactant, an amphoteric surfactant, and a combination thereof in an amount effective to stabilize the wax in the composition. On the contrary, Dufay does not disclose any kind of wax in any amount as being an essential. Dufay discloses waxes at [0063 and 0064], but they are clearly optional and nonessential and does not disclose any useful amount. As evidence of non-criticality, none of the working examples in Table 1 of Dufay employ a wax of any kind in any amount. Dufay also does not disclose an anionic surfactant in any amount as being essential. Dufay discloses that preparations may include anionic, nonionic, cationic, and/or amphoteric, or zwitterionic surfactants at from normally about 1 to about 70 wt% [0060, first sentence], but does not disclose an anionic surfactant as being essential. As evidence of non-criticality, none of the working examples in Table 1 of Dufay disclose an anionic surfactant.

Second, the claims 1, 28, and 29 are not suggested in view of the considerable picking and choosing that must be employed to modify the composition of Dufay to yield the present invention. To obtain the claimed invention, the Dufay compositions would have to be formed as follows: 1) select a wax from among the lengthy list of functional classes of optional ingredients (list delineated above in the summary of the disclosure of Dufay), 2)

select a wax having a melting point of 70° C or more from the list at [0064], 3) select an amount of wax from about 0.5 wt% to about 20 wt% when Dufay makes no mention of disclosure of any amount of wax, 4) select a surfactant from among the lengthy list of functional classes of optional ingredients (see above in the summary of the disclosure of Dufay), 5) select an anionic surfactant from among the disclosed optional surfactants [0060], 6) select an amount of the anionic surfactant effective to stabilize the wax in conjunction with a nonionic surfactant and/or amphoteric surfactant. In summary, one skilled in the art would have to make six selections with regard to at two optional ingredients and amounts thereof to arrive at the claimed invention.

(ii) Dependent claims 2 to 10, 21, and 24

Further with respect to the foregoing paragraph(s), for the remaining dependent claims, additional, narrower selections would have to be made - rendering suggestion even less likely. Claims 2 to 10, 21, and 24 require yet narrower wax melting point ranges, iodine point ranges, amounts, hardness, and species selection. Claims 11, 12, 21, and 25 required yet narrower surfactant amount ranges. Claims 13 to 15, 21, and 24 require yet narrower water amount ranges. Claims 16 to 18, 21, and 24 require yet narrower composition viscosity ranges.

(iii) Dependent claims 19, 22, and 25

Still further, a prima facie case was not properly set forth for claims 19, 22, and 25. Claims 19, 22, and 25 require the composition be a dispersion. Dufay discloses an emulsion [0005 and 0007] but does not disclose a dispersion. Dufay mentions the term "dispersion" [0002, last sentence] but it is employed in the

context of prior art/background and the emulsion form. Thus, the dispersion form of claims 19, 22, and 25 is not disclosed in Dufay. The dispersion and emulsion forms are distinguished in the specification at page 7, line 30 to page 8, line 6. Emulsions are separately claimed in the present application in claims 20, 23, and 26. The Final Rejection dated August 18, 2005 made no mention of or correlation between dispersions and emulsions nor any identification of the dispersion form in Dufay. Thus, the requirement (4) of ascertaining the differences between the closest disclosed prior art and the claimed invention was not met for claims 19, 22, and 25.

From the foregoing, it is apparent that Dufay does not suggest the subject matter of claims 1 to 29, hence it cannot render such claims prima facie obvious.

2. Further to the rejection of claims 1 to 29 under 35 U.S.C. 103(a) in view of U.S. Published Application No. 2002/0010114 to Dufay et al., are such claims nonobvious over the disclosure of Dufay et al.?

(i) Independent claim 1 and dependent claims 28 and 29

Claims 1, 28, and 29 are indeed nonobvious for the reasons set forth in response to issue # 1 as well as the additional reasons set forth below.

The claimed composition affords surprising performance advantages not contemplated by Dufay. The applicants surprisingly found that a cleansing composition that includes a high melting point (melting point of 70° C or more) wax provides gentle, effective cleaning yet provides for protection and/or replenishment of essential skin oils. In particular, it was surprisingly found that a high melting point wax included in the

cleansing composition provides a protective layer that conditions and moisturizes while facilitating the replenishment of such content in the skin or hair. Additionally, including the high melting point wax enhances the wash resistance and integrity of the formed protective layer (page 3).

The Final Rejection asserts that mere statements of surprising results are not sufficient to overcome a prima facie case of obviousness. However, in view of the lack of showing of prima facie obviousness as demonstrated above, this point is moot.

Although Dufay describes a fatty acid alkyl ester and emulsifier cleaning composition that may include a variety of optional ingredients, there is no teaching or suggestion to include a wax having a high melting point to achieve the surprising advantages of the present invention. While Dufay discloses cleaning preparations as being useful as concentrates for mild skin cleansers, they are also suitable, in principle, for domestic and industrial applications involving the cleaning of hard, oil-polluted surfaces (paragraph 0058). One of ordinary skill in the art aiming to provide a composition to cleanse the skin or hair while protecting and replenishing essential oils therein would not look to the teachings of Dufay to do so.

While some of the waxes having the high melting point required by the present invention are listed in the lengthy list of waxes in Dufay [0064], there is no indication that one wax would be suitable over another for the purpose of providing gentle, effective cleaning yet providing for protection and/or replenishment of essential skin oils. Thus, the claimed invention is neither taught nor suggested by Dufay.

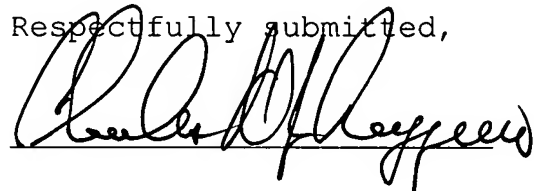
(ii) Dependent claims 19, 22, and 25

Claims 19, 22, and 25 are further nonobvious over Dufay because they require the composition be a dispersion. Dufay discloses an emulsion [0005 and 0007] but does not disclose a dispersion. Dufay mentions the term "dispersion" [0002, last sentence] but it is employed in the context of prior art/background and the emulsion form. Thus, the dispersion form of claims 19, 22, and 25 is not disclosed in Dufay. The dispersion and emulsion forms are distinguished in the specification at page 7, line 30 to page 8, line 6. Emulsions are separately claimed in the present application in claims 20, 23, and 26.

Reconsideration of claims 1 to 29 is deemed warranted in view of the foregoing, and allowance of said claims is earnestly solicited.

Dated: September 5, 2007

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Charles N. J. Ruggiero", is written over a horizontal line.

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CLAIMS APPENDIX

1. (Original) A topical aqueous cleansing composition, comprising:

about 0.05 wt% to about 20 wt% of one or more waxes having a melting point of about 70° C or more;

an anionic surfactant and an additional surfactant selected from the group consisting of a nonionic surfactant, an amphoteric surfactant, and a combination of a nonionic surfactant and an amphoteric surfactant, in an amount effective to stabilize the wax in the composition; and

about 20 wt% or more water.

2. (Original) The composition of claim 1, wherein the one or more waxes has a melting point of about 80° C to about 100° C.

3. (Original) The composition of claim 1, wherein the one or more waxes has a melting point of about 85° C to about 90° C.

4. (Original) The composition of claim 1, wherein the one or more waxes has a hydrogenated oil with an iodine point of about 40 or less.

5. (Original) The composition of claim 1, wherein the one or more waxes is a hydrogenated oil with an iodine point of about 5 or less.

6. (Original) The composition of claim 1, wherein the one or more waxes is present at about 0.4 to about 10 wt%.

7. (Original) The composition of claim 1, wherein the one or more waxes is present at about 1 to about 5 wt%.

8. (Original) The composition of claim 1, wherein the one or more waxes is selected from the group consisting of hydrogenated castor oil wax, candelilla wax, carnauba wax, hydrogenated jojoba wax, beeswax, ozokerite, lanolin wax, montan wax, paraffin, palm kernel wax, ceresin, silicone waxes, cetyl esters, and any combinations thereof.

9. (Original) The composition of claim 1, wherein the one or more waxes has a hardness of about 4 or more.

10. (Original) The composition of claim 1, wherein the one or more waxes has a hardness of about 4 to about 14.

11. (Original) The composition of claim 1, wherein the composition has about 5 to about 50 wt% of one or more anionic surfactants, about 1 to about 15 wt% of one or more nonionic surfactants, and about 1 to about 40 wt% of one or more amphoteric surfactants.

12. (Original) The composition of claim 1, wherein the composition has about 15 to about 30 wt% of one or more anionic surfactants, about 5 to about 10 wt% of one or more nonionic surfactants, and about 5 to about 15 wt% of one or more amphoteric surfactants.

13. (Original) The composition of claim 1, wherein the water is present at about 20 wt% to about 90 wt%.

14. (Original) The composition of claim 1, wherein the water is present at about 40 wt% to about 80 wt%.

15. (Original) The composition of claim 1, wherein the water is present at about 60 wt% to about 80 wt%.

16. (Original) The composition of claim 1, wherein the viscosity of the composition is about 1,000 to about 40,000 cps.

17. (Original) The composition of claim 1, wherein the viscosity of the composition is about 10,000 to about 40,000 cps.

18. (Original) The composition of claim 1, wherein the viscosity of the composition is about 10,000 to about 30,000 cps.

19. (Original) The composition of claim 1, wherein the composition is in the form of a dispersion.

20. (Original) The composition of claim 1, wherein the composition is in the form of an emulsion.

21. (Original) The composition of claim 1, wherein the wax has a melting point of about 80° C to about 100° C, wherein the wax is present from about 0.1 to about 10 wt%, wherein the composition has about 5 to about 50 wt% of one or more anionic surfactants, about 1 to about 15 wt% of one or more nonionic surfactants, and about 1 to about 40 wt% of one or more amphoteric surfactants, wherein the water is present at about 40 wt% to about 80 wt%, and wherein the composition has a viscosity of about 10,000 to about 40,000 cps.

22. (Original) The composition of claim 21, wherein the composition is in the form of a dispersion.

23. (Original) The composition of claim 21, wherein the composition is in the form of an emulsion.

24. (Original) The composition of claim 1, wherein the wax has a melting point of about 85° C to about 90° C, wherein the wax is present from about 0.4 to about 4.0 wt%, wherein the composition has about 15 to about 30 wt% of one or more anionic surfactants, about 5 to about 10 wt% of one or more nonionic surfactants, and about 5 to about 15 wt% of one or more amphoteric surfactants, and wherein the water is present at about 60 wt% to about 80 wt%, and wherein the composition has a viscosity of about 10,000 to about 30,000 cps.

25. (Original) The composition of claim 24, wherein the composition is in the form of a dispersion.

26. (Original) The composition of claim 24, wherein the composition is in the form of an emulsion.

27. (Original) The composition of claim 1, wherein the composition is substantially free of thickeners or viscosifiers other than the high melting point wax.

28. (Original) A method of cleansing a keratinous surface, comprising applying to the surface the composition of claim 1 and then rinsing the surface.

29. (Original) A method of moisturizing a keratinous surface, comprising applying to the surface the composition of claim 1 and then rinsing the surface.

EVIDENCE APPENDIX

There is none.

RELATED PROCEEDINGS APPENDIX

There are none.